

COPY
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9:54 O'Clock AM

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

APR 15 2010

IN AND FOR THE COUNTY OF YAVAPAI

JEANNE HICKS, Clerk
S/Chamberlain
Deputy

THE STATE OF ARIZONA,)
)
Plaintiff,)
)
vs.)
)
STEVEN CARROLL DEMOCKER,)
)
Defendant.)
)

No. CR 2008-1339

BEFORE: THE HONORABLE THOMAS B. LINDBERG
JUDGE OF THE SUPERIOR COURT
DIVISION SIX
YAVAPAI COUNTY, ARIZONA

PRESCOTT, ARIZONA
TUESDAY, APRIL 13, 2010
11:11 A.M.
A.M. SESSION ONLY

REPORTER'S TRANSCRIPT OF PROCEEDINGS

PRETRIAL MOTIONS

ROXANNE E. TARN, CR
Certified Court Reporter
Certificate No. 50808

APRIL 13, 2010
11:11 A.M.

PRETRIAL MOTIONS

APPEARANCES:

FOR THE STATE: MR. JOE BUTNER AND MR. JEFF
PAPOURE.

FOR THE DEFENDANT: MR. JOHN SEARS, MR. LARRY
HAMMOND AND MS. ANNE CHAPMAN.

THE COURT: This is State versus Steven
Carroll DeMocker. It is CR 2008-1339. The defendant is
present in custody with Mr. Sears, Mr. Hammond, Ms. Chapman,
here for the defense team. Mr. Butner is here for the
prosecution.

I am open to hearing from you what
issues you may have. Obviously, this afternoon we have
Suzanne Smith appearing at 1:15, and I think my staff has
provided each of you with some other information on jurors.
On April 8th, I already had excused potential jurors
Cartilage, Marshal, Bower, Rouche. I think we received,
after that hearing concluded, some additional information
from a Sharon Johnson, and I noted that she was on your list
of potential jurors to be excused, in any event, from the
defense team.

I don't know the State's position with
regard to excusing Miss Johnson after the information that I
think my staff provided to you.

1 MR. BUTNER: I am not prepared on that, Judge.
2 I will be this afternoon.

3 THE COURT: Okay. We can discuss it this
4 afternoon.

5 Mr. Sears.

6 MR. SEARS: Judge, we have a number of things
7 that we would like to take up. We are prepared to argue our
8 motion to preclude certain matters disclosed in State's
9 supplemental disclosures 50 through 54. That's been fully
10 briefed now. The reply was filed yesterday. Ms. Chapman
11 would be prepared now to speak to that.

12 We have a number of other matters related
13 to conditions for Mr. DeMocker -- some matters related to his
14 grooming and appearance in court.

15 We also have a number of questions -- and
16 we don't know whether the State shares any of these questions
17 or not -- as follow-ups to your ruling at the end of last
18 week on our various motions for sanctions. There are some
19 aspects of that that, even after looking at the transcript
20 that we received from that proceeding, we are not entirely
21 sure about going forward. We want to know if you would
22 provide us with a bit more clarity on portions of the ruling
23 there.

24 And other than that, we are prepared to
25 start the motions. We're also prepared, obviously, this

1 afternoon to discuss matters regarding jury selection, and we
2 have been for some time.

3 THE COURT: Before I commence on that,
4 Mr. Butner, Chris Dupont, the representative for Katie
5 DeMocker, sent us and showed a copy to you and to Mr. Sears
6 and Mr. Hammond and Ms. Chapman -- sent an e-mail referring
7 to the subpoena of Katie DeMocker indicating that he would
8 accept service of a subpoena on behalf of Katie DeMocker. I
9 presume you have looked at that e-mail.

10 MR. BUTNER: I have, Judge. He also
11 indicated -- I follow-up with a phone call directly to
12 Mr. Dupont. He also indicated that he would accept service
13 for Charlotte DeMocker, and we were going to try and work
14 with them to, you know, make this a relatively convenient
15 kind of a thing, if at all possible.

16 THE COURT: Okay. So you are going to provide
17 the actual time and notify him about what other travel funds
18 may be available to his client -- or clients, plural?

19 MR. BUTNER: Right. Well, I don't think, you
20 know, there's any travel funds necessary for Charlotte, but
21 Katie -- we did indicate that we would be paying for her to
22 come over. If I understood him correctly, he indicated he
23 didn't think she would be going back, it would just be one
24 way, and he thought that she would be driving. So I am going
25 to finalize that sort of situation with the people that

1 handle those kinds of things in our office.

2 THE COURT: Do you agree with the observations
3 on his e-mail that that should make the L.A. proceedings
4 issue moot?

5 MR. BUTNER: I do.

6 THE COURT: Good. Then I won't worry about it
7 anymore.

8 MR. BUTNER: Thank you.

9 THE COURT: Unless some further hiccups come
10 into play.

11 Is there any update on Sorenson?

12 MR. BUTNER: I haven't gotten anything from
13 Sorenson yet, Judge. I was going to try to get ahold of them
14 today.

15 THE COURT: All right. Some of the issues
16 raised by the motion concerning the State's 50th through 54th
17 disclosure, that motion filed March 30th with a response by
18 the State and a reply by the defense, some of that may
19 overlap with some of the other issues that you are talking
20 about with regard to clarity or lack of clarity in my ruling.
21 So why don't we go ahead with that one, and if there is some
22 other issues that you think I need to touch on in connection
23 with that, I will.

24 Ms. Chapman.

25 MS. CHAPMAN: Thank you, Your Honor. We start

1 the motion by talking about the supplemental report, which
2 the State provided in its response from Sergeant Winslow. He
3 does two things in that supplemental report.

4 One is he goes back and attempts to
5 reconstruct by track measurements that were left 17 months
6 earlier behind the property of Ms. Kennedy. We have several
7 objections to his ability to do that, the primary one being
8 that there is just no reliable way for him to reconstruct
9 what happened 17 months earlier, based on his own memory.

10 And in addition to that, the State had an
11 obligation and a duty to perform those measurements at the
12 time in July, when the tracks were actually there and visible
13 to Sergeant Winslow or anyone else who could have performed
14 those measurements and not disclose them to us as late as
15 they have. They disclosed this information on March 17 to
16 the defense. It hadn't been disclosed earlier. Those
17 measurements were not performed earlier, as far as we know.
18 And frankly, we don't think they are at all reliable.

19 The other thing that he does, Your Honor,
20 is he purports to perform shoeprint comparisons. And in the
21 second piece of his report, what he does is -- in his
22 interview, he told Mr. Sears that he had no recollection of
23 any shoeprints being near the bike track. And what the
24 State's response says is essentially that Mr. Winslow was
25 trying to refresh his recollection by looking at photographs

1 to determine whether or not there were shoeprints near the
2 bike tracks. And while it may be appropriate for him to
3 refresh his recollection to do that, what he goes on to do is
4 to compare photographs of shoeprints with other photographs
5 of shoeprints, or perhaps his memory is unclear from the
6 report, but he certainly does photograph-to-photograph
7 comparison.

8 He then attempts to draw conclusions
9 about whether photographs of certain shoeprints match other
10 photographs of other shoeprints, which direction those
11 shoeprints are headed, how many shoeprints are in each
12 photograph, whether the shoeprints within each photograph
13 were similar, and whether the shoeprints between photographs
14 are similar. He has not been disclosed as a shoeprint
15 comparison expert. Those are not based on his personal
16 observations of the scene. He couldn't remember observing
17 any shoeprints that were near those bike tracks at the
18 interview. And those opinions were disclosed to us also on
19 March 17, after his defense interview. They are not
20 permitted under 701. It's not based on his personal
21 observation. They are late disclosed, and he is not an
22 expert who's qualified to make those opinions.

23 So that is the first piece of this
24 motion.

25 THE COURT: Let's take it individually.

1 Mr. Butner.

2 MR. BUTNER: Sergeant Winslow did go back to
3 the scene. Based on his own memory, he went back and with
4 photographs he attempted to measure where those footprints
5 were that he observed when he was out there. And then using
6 those photographs, he also refreshed his recollection to the
7 fact that were shoeprints alongside the bicycle tracks.

8 This is permissible to do. People
9 frequently refresh their recollection with photographs and
10 other items of evidence like that. He was under no duty to
11 stop with his investigation simply because he had a defense
12 interview.

13 So I think it is permissible, what he
14 did. He is certainly not going to testify as an expert, but
15 you can't expect somebody to get on the stand and say
16 something that simply isn't true because they forgot at the
17 time of their defense interview.

18 All he was doing was going back and
19 refreshing his recollection, to make sure that his
20 recollection was accurate, and when it wasn't, he then
21 corrected his recollection and issued a report in that
22 regard. He's not going to be offered as an expert on
23 shoeprint comparison. And if you'll note -- I guess you
24 don't have a copy of the report -- but the report indicates
25 that he didn't find any difference between the shoeprints and

1 those that were present at the scene.

2 MS. CHAPMAN: Your Honor, you actually do have
3 a copy of the report. It was provided to you as Exhibit A to
4 the State's response.

5 And what he says is that he compares
6 multiple tracks and he describes them as being similar, he
7 describes them as having little difference, he describes
8 them, again, as being similar, and appear to be made by the
9 same and similar shoe. So he is making shoeprint comparison.
10 That is not a refreshing of his recollection.

11 What Mr. Butner is offering him to
12 testify to is that he can look at a photograph and determine
13 that there were shoeprints there that he didn't remember were
14 there, I think that is fine. But if he's going to compare
15 those shoeprints to other shoeprints in other photographs or
16 two shoeprints within the same photograph, that is not a
17 matter of refreshing his recollection, that's not a matter
18 that he is qualified to testify about, and that is precisely
19 what he attempts to do at Bates Page 19763, which is the
20 second page of the Exhibit A of the State's response. That
21 is with respect to the shoeprint comparison that he is
22 performing in this report that's disclosed to us on
23 March 17.

24 And Your Honor, I don't think there is
25 any dispute that with respect to the measurements -- he

1 performed them 17 months later -- whether or not he had
2 photographs that he took 17 months earlier of the track, he
3 doesn't know where that began, where it ended, and to perform
4 measurements and come in and testify about what those
5 measurements were 17 months later, there is no way for that
6 to be reliable at all, and the State had an obligation to
7 perform that in July of 2008, not in February of 2010, two
8 months before trial in this matter.

9 THE COURT: During his first interview, did he
10 give estimations of where the shoeprints were, the bike
11 prints were -- tire prints were?

12 MS. CHAPMAN: Your Honor, my memory is --
13 Mr. Sears was at the interview -- but my memory is that he
14 said he did not have a clear recollection of where they were.

15 THE COURT: So he didn't give approximately
16 such and such a distance?

17 MS. CHAPMAN: I don't believe he did. I think
18 he said he could not remember.

19 THE COURT: Whereas now in the report he gives
20 some distance that's based on taking a measurement from where
21 he estimates the prints were but not -- obviously, they are
22 not still there at the time of the conducted measurements.

23 MS. CHAPMAN: He takes approximately 20
24 measurements and measures them by feet. He's very precise,
25 and he's creating a whole track of measurements, based on his

1 memory of where these bike tracks were 17 months earlier, in
2 this new report.

3 THE COURT: Do you think that at all goes to
4 weight rather than admissibility and you can impeach the snot
5 out of them for what --

6 MS. CHAPMAN: Well, I think we could do that,
7 Your Honor. But I think the fact that they waited 17 months
8 to do this and didn't disclose it to us until March, after
9 the defense interview, is enough to preclude it on that
10 basis.

11 These measurements should have been
12 performed in July of '08. That was their obligation, and
13 that's when they should have done it. They didn't do it
14 then.

15 So we haven't had an opportunity to look
16 at this until now. Our experts haven't had an opportunity to
17 go out there and examine it. And we have three weeks to go.

18 So it could be an impeachment matter, but
19 it should be a preclusion matter based on their due diligence
20 and their failure to exercise it.

21 THE COURT: Mr. Butner?

22 MR. BUTNER: Well, Judge, my recollection of
23 Sergeant Winslow's testimony was that he was not sure of the
24 exact location of the footprints, and he stated that in his
25 interview. But I think he did give an estimate as to when

1 they began. And beyond that, you know, I can't tell you with
2 any precision.

3 THE COURT: Then you are going to present him
4 as saying, though, he took a ruler out there and it's now
5 such-and-such feet or --

6 MR. BUTNER: Well, certainly any testimony he
7 would give would be based on foundation that was laid
8 beforehand, so any measurements that he testifies about are
9 going to be measurements that he has to admit on the witness
10 stand were taken much later than the time of the photographs
11 were taken. I think it does go to the weight, Judge, rather
12 than the admissibility.

13 THE COURT: And the testimony with regard to
14 shoeprints, he is not going to say identity, he is not even
15 going to say similar, he is not going to say that he
16 remembered what the pattern was in the shoeprints in the
17 manner in which a lay witness would, under Rule 701 --

18 MR. BUTNER: If he is asked "Did you look at
19 the shoeprints at some point to compare them with what was
20 much later discovered, obviously -- the La Sportiva shoe,"
21 Judge, he is in a position to say "I couldn't find any
22 difference between them."

23 He is not the witness that is going
24 to be presenting that kind of testimony.

25 THE COURT: I am going to preclude this

1 testimony. I think to talk about it at all, rather than in
2 descriptive terms of here is what I observed in terms of the
3 detail of what I saw in the sand or clay or whatever it
4 was -- I mean, he could testify to that, apparently, when he
5 was interviewed. He didn't even testify to that. Rather, he
6 had to, quote, "refresh his recollection," close quote, using
7 photographs.

8 So the question is, is his recollection
9 really refreshed, or is he simply testifying as to what he
10 sees now in the photograph. And I think the jury is capable
11 of making conclusions about those things. They don't need
12 any testimony of what his recollection was, unless he can
13 honestly swear that this recollection had a certain pattern
14 of shoe to it. So I --

15 MR. BUTNER: Judge, what he provided in his
16 interview was that it looked to be a hiking type of boot, is
17 what he stated in his interview.

18 THE COURT: I think he can say that.

19 MR. BUTNER: Okay.

20 THE COURT: But I don't think he can say
21 anything about what the pattern was unless he had a
22 recollection of that without simply relying on the
23 photographs to, quote, "remember," close quote. And
24 certainly he is not the expert to testify as to whether that
25 shoe may -- we have another issue with regard to that, I

1 know, but I don't think Sergeant Winslow can testify under
2 Rule 702 as an expert.

3 I think the measurements go to weight,
4 not admissibility. And, frankly, the precision of his
5 measurements is totally in question. You are going to have
6 to lay a foundation for how he made any kind of determination
7 as to that, and I may sustain a foundation objection, but not
8 on a disclosure basis.

9 Next item.

10 MS. CHAPMAN: Your Honor, the next --

11 THE COURT: It's similar?

12 MS. CHAPMAN: It is. It is. It's with
13 respect to Mr. Mascher -- Commander Mascher. Your Honor,
14 this is, I think, another example of the State trying to
15 provide expert testimony by calling it personal observation.

16 Commander Mascher performed an
17 examination of a sample shoe that the defense has never been
18 provided with. He then compared that sample shoe to
19 shoeprints at the scene. He then opines about whether the
20 sample shoe matches shoeprints found at the scene.

21 He then performs another examination by
22 purporting to trace the sole of the sample shoe and compare
23 that to prints at the scene. He then compares those soles.
24 He then purports to determine a size of the print at the
25 scene, which I believe the State's late-disclosed expert on

1 shoeprint examination said was impossible.

2 These are not personal observations under
3 Rule 701. These are scientific examinations and experiment.
4 The State has late disclosed another expert on these issues.
5 Commander Mascher is not a shoeprint expert. The State has
6 repeatedly avowed that to this Court and has repeatedly
7 avowed that it's not going to be offering Commander Mascher
8 as an expert on these issues.

9 I mean, to a certain extent, anytime an
10 expert performs an examination and then testifies about that
11 examination, I guess that could be described as his personal
12 observation about the examination, but that is no more or
13 less than what this is. And Commander Mascher doesn't have
14 the training or qualifications to do this kind of examination
15 or testing that he's purporting to perform in this report.

16 Furthermore, this report was disclosed to
17 us, I believe, also on March 17. There has been no
18 disclosure about Commander Mascher's training to perform
19 these kinds of comparison or examinations.

20 And the defense -- we have never been
21 provided with a sample shoe. We have no ability to acquire a
22 sample shoe like this. These shoes are not for sale. We
23 can't perform an examination similar to the one Commander
24 Mascher performed. We can't evaluate his comparison because
25 we have no access to the thing he used to perform his

1 examination that he is not qualified to perform.

2 So we would ask you to exclude it on all
3 of these bases.

4 THE COURT: Mr. Butner.

5 MR. BUTNER: Judge, this is another sort of a
6 situation where Commander Mascher compared the footprints
7 that he observed at the scene with the recently discovered La
8 Sportiva shoe to see if he noted any differences based upon
9 his personal observations when he was out at the scene. He
10 is not being offered as an expert in that regard.

11 But in the event he were to be asked some
12 sort of a question like, well, "Did you find any difference
13 between the La Sportiva shoes and the shoeprints that you
14 observed at the scene when you were tracking out there," he
15 could answer, "Well, based on my comparison, I didn't find
16 any such differences."

17 He will not be offered as a witness on
18 that particular fact. He will be offered as witness only on
19 the tracking.

20 THE COURT: So what direction the shoes were
21 going, he can tell the heel from the toe and that --

22 MR. BUTNER: He can tell that kind of
23 information, Judge, and that is significant for his
24 testimony, in terms of the direction the person is headed.

25 THE COURT: But he would say something beyond

1 what Winslow would say in terms of it looked like a hiking
2 boot or shoe.

3 MR. BUTNER: That is basically what he would
4 say, that it looked like a hiking shoe or boot, just like
5 Detective Winslow. And he did not have any idea what type it
6 was when he was out there tracking, and he wouldn't know
7 anything until, of course, we discovered the La Sportiva shoe
8 sole.

9 THE COURT: Well, did he have a notation in
10 his reports and the like of what the pattern was on the
11 purported hiking shoe?

12 MR. BUTNER: You mean the specificity of the
13 pattern, these kind of marks and that kind of thing?

14 THE COURT: Uh-huh.

15 MR. BUTNER: I am sure that something was not
16 done like that in his report.

17 THE COURT: But in terms of following -- you
18 represented earlier that he was a tracking expert, not a
19 shoeprint expert --

20 MR. BUTNER: That's correct, Judge.

21 THE COURT: -- and so following a set of
22 tracks from Point A to Point B to Point C to Point D, he has
23 developed some skills and expertise with regard to that.

24 MR. BUTNER: That's correct.

25 THE COURT: And that was the area, I think,

1 that you previously said he was going to do.

2 MR. BUTNER: That's correct.

3 THE COURT: I think that that's -- he's had
4 sufficient training to be able to do that. I don't think
5 that he is a shoeprint expert. I don't think that he can
6 testify as to a pattern of what he saw or similarity to a
7 La Sportiva shoe that was found. I think that is more on
8 foundational grounds and lack of disclosure.

9 With regard to his qualifications for
10 being a shoeprint identification expert, following tracks
11 from Point A to Point B and describing in terms -- general or
12 precise, depending on whether he did any measurements --
13 about the direction they went, when they changed and that
14 sort of thing, to the extent he can do that, I think is
15 admissible.

16 If he had some degree of information as
17 far as what his observations were about the pattern that was
18 made by the shoes, that he made a note of at the time, that
19 is fine. But if he is simply relying on photographs and
20 saying that "The photographs look to me, as a tracker, like
21 the same pattern as are on the bottom of the La Sportiva
22 shoe," I don't think there is foundation for him to do that.
23 I don't think that he is an expert to be capable of doing
24 that, and I would preclude that testimony -- or even to say
25 it is similar, because I think that is getting into an

1 expertise that he doesn't have and admittedly, at some prior
2 hearing, it was indicated that he didn't have.

3 Next issue.

4 MS. CHAPMAN: Your Honor, the next issue is
5 with respect to the ~~P.I.B. computer forensic reports~~ and
6 examination. And Your Honor, we did discuss this briefly,
7 because it was briefed initially, based on the partial
8 disclosure that the State has made in the February 5th
9 filing. Since that time, Your Honor, we've received, I
10 think, approximately 12 additional CDs from the State.

11 I have provided Your Honor with the
12 reports -- at least partial reports that identify the date
13 that the report was requested so that Your Honor can see --
14 because you noted, on April 8th, that these examinations take
15 time, and that part of the due diligence with respect to the
16 late disclosure of what is now approximately 70,000 pages of
17 reports, an e-mail that was based on the time it takes to
18 conduct these examinations, and you will see from those
19 attachments that these examinations were requested in
20 February and March. Those examinations and those requests
21 that were done in February and March have resulted in a
22 production to us of approximately 70,000 pages of e-mails and
23 reports that have been disclosed. Seven of those CDs were
24 provided in the -- on March 2nd and March 17th, and five
25 additional were disclosed on April 1st.

12
add'l
CDs

e-mails
5
repts

72
5
CDs

70,000 pages
e-mails & repts

1 We have had serious issues with the
2 process of the D.P.S. examination disclosure. As you will
3 recall, the power source wasn't removed from one of these
4 items. That created destruction of some of these items. The
5 examination has been performed by largely by non-qualified
6 non-expert Detective Page. *exam. by Det. Page*

7 And we have yet to receive the EnCase
8 case files, which our expert requires in order to conduct a *enCase files*
9 thorough examination of the examination and evaluation done
10 by D.P.S. We have been asking for this for months. We *req. by D.S. expert*
11 talked about it when Randy Arthur was on the stand. We filed
12 motions about it to detail for the State and for Your Honor
13 what the EnCase case file is, what it means, how critical it
14 is to the examination, both in terms of what D.P.S. does and
15 in terms of our expert's ability to examine it. *EnCase case file*

16 We are, frankly, just not a position to
17 review what has now been disclosed to us at this late date.
18 It is also unclear from the reports and disclosure whether
19 these are now complete. The State has had these items since
20 July of '08, with the exception of the report that's detailed
21 at -- a Report 4, which they had since January.

22 And you will note that they didn't begin
23 the examination of those items until seven months later, and
24 that came from Detective Arthur's testimony. And Your Honor,
25 we are frankly just not in a position to be prepared to

1 review what was disclosed at this late date. The State has
2 offered no excuse.

3 I believe Mr. Butner said he doesn't know
4 where we're getting the dates of the February and March
5 request, but now you have them, he has them. We know when
6 the requests were made, we know when they were disclosed, and
7 we think they should be precluded on that basis.

8 THE COURT: And so effectively, what does that
9 mean? Obviously, you've had some disclosure and some
10 knowledge of certain items from the computer with regard to
11 what Detective Page testified about at the Simpson hearing
12 and the Chronis hearing.

13 MS. CHAPMAN: Right. Well, I have no way to
14 know what -- I mean, I know what Detective Page and what the
15 State disclosed earlier with respect to those e-mails that
16 were disclosed at the Chronis hearing. I have no way to know
17 whether those are duplicated. I assume that there is some
18 duplicated in the 68-, 70,000 pages that we got in the last
19 three or four weeks, but I frankly haven't performed that
20 evaluation. None of these disclosures are Bates stamped.
21 They are just disclosed to us on a CD. So I just don't know
22 the answer to that question, Your Honor.

23 THE COURT: Thank you.

24 Mr. Butner.

25 MR. BUTNER: Well, Judge, first of all, we've

1 only heard testimony from one expert, so to speak, concerning
2 the EnCase case file, and Detective Arthur said he doesn't
3 understand what they are talking about in that regard, and
4 they don't have such things, and that is not the way it is
5 done. I am not in any position to really argue that
6 particular fact, but the only evidence that is before the
7 Court concerning that is from the testimony of Randy Arthur.

8 In regard to the dates -- and I looked at
9 the reports with those dates in there -- in regard to the
10 dates of requested examination, that's the latest date of
11 requested examination that was noted in the report. Those
12 requested examinations were ongoing from back in -- when I
13 first got involved in this case, and I can't speak to sooner
14 than that, but I certainly was all over the people at the
15 D.P.S. lab and including Detective Page, saying we've got to
16 get these examinations done on these computers. So I don't
17 know exactly how they came up with the date, other than we
18 had frequent meetings with them saying you need to get the
19 computer examination and analysis completed. At points in
20 time we were meeting on a weekly basis with them
21 telephonically, inquiring as to what kind of progress they
22 had made.

23 In regard to -- one of the reports by the
24 expert that checked the computer to see how it worked, so to
25 speak, and what caused it to go off and on, that kind of

1 thing, that was requested by me probably in January, and I
2 wanted them to video the entire process of that computer
3 turning itself on and then turning itself off as the power
4 died in order to discover, if you will, what the problem was
5 in terms of the alleged destruction of files in
6 Mr. DeMocker's laptop computer. That report was done in
7 order to ascertain exactly what that process was, Judge, and
8 it had been requested previously. It was insistently
9 requested the last time to get it accomplished, and
10 apparently that is the date that they finally took note of
11 it. So that is how that date got into the report.

12 Detective Page, you heard his testimony
13 on previous occasions as to what kind of analysis he had been
14 doing, including getting the e-mails printed out. He
15 produced the e-mails for the Chronis hearing, which is prior
16 to the time of the argument that it was late disclosed. He
17 also produced the information concerning Mr. DeMocker's word
18 searches in his computers.

19 THE COURT: So is that all you are intending
20 to get in, now, out of all of the 70,000 pages that allegedly
21 has now been disclosed and CDs that are not Bates stamped?

22 MR. BUTNER: It appears, though, Judge, that
23 the only evidence that I really deem relevant and now
24 admissible is, first of all, the evidence about the word
25 searches at the beginning in how to make a suicide look like

1 a homicide -- or rather how to make a homicide look like a
2 suicide or an accident. That testimony.

3 And then the e-mails that were presented
4 at the Chronis hearing and any prior e-mails that were
5 presented at hearings, if I am overlooking any, and I don't
6 think I am. But I am sure about the ones that were presented
7 in the Chronis hearing. Those e-mails.

8 E-mails that were early disclosed in the
9 case at the outset. And then the Court has already precluded
10 the UBS e-mails. So I think that that's basically it, Judge.

11 And especially the analysis, the
12 explanation of how the computer reacts when the power supply
13 has not been removed and it is still in storage and it turns
14 itself on and turns itself off, allegedly resulting in file
15 destruction.

16 THE COURT: So despite the fact that there is
17 60,000 or 70,000, whatever the number actually is of pages of
18 information from the computer, your intention is not to go
19 outside of what essentially has already been used in Simpson
20 and Chronis hearings --

21 MR. BUTNER: Yes.

22 THE COURT: -- and the explanation about the
23 videotaping about the way in which the computer works.

24 MR. BUTNER: Right. We would like to revisit
25 the issue, at some point, of the Jennifer Rydzewski e-mail,

1 though, Judge, because of the fact that that disclosure took
2 place practically at the beginning of this case with County
3 Attorney's Office.

4 THE COURT: Well, if you want to revisit that,
5 tell me what the reason is that that might be admissible.

6 MR. BUTNER: Judge, it is in extremely close
7 proximity in time to the time of the homicide, and it
8 evidences the defendant's state of mind, when he says,
9 basically, burn it and bury it, and it's a joint account that
10 he shared with Carol Kennedy. And I think that that's very
11 appropriate information. That was disclosed to the defense
12 at the outset of this case, and it's something that I think
13 the jury is entitled to see. It is probative of the
14 defendant's state of mind on the date that the homicide
15 occurred.

16 THE COURT: It's too remote. I don't find it
17 relevant. I will stay with the decision I already made with
18 regard to that.

19 MS. CHAPMAN: Your Honor, I just want to
20 correct the record with respect to one thing. You do have
21 evidence in the record about the EnCase case file, because we
22 filed it in the motion that we filed on February 25th from
23 the EnCase case manual that identified it was critical piece
24 and part of the evaluation for EnCase. Mr. Arthur,
25 apparently, is the head of the D.P.S. computer forensics lab.

1 So the fact that he didn't have the information is
2 disturbing, but it is not the only word that Your Honor has
3 in the record about the existence of the file and its
4 importance to this kind of forensic examination.

5 If the Court is going to limit and if the
6 State is going to be limited to the e-mails that were
7 previously presented at the Chronis hearing and the Simpson
8 hearing and to the word searches that have been previously
9 disclosed at those hearings and to this analysis about how
10 the computer reacts when the power source is not removed and
11 it brings itself back on -- if they are limited to those
12 things and they can identify those e-mails or those e-mails
13 are identified, specifically with respect to what's already
14 been admitted, then I think we are fine. But I think that
15 needs to be very carefully defined, because the disclosure,
16 as it's been presented, has never been Bates numbered to us,
17 it's just put on a CD, and so we don't have any way to keep
18 track of them, unless the State does it, or unless it's
19 identified by previous evidence item number. And so I just
20 want to be very clear if we are going to limit it that way,
21 that we do it in a way that makes the record eminently clear,
22 so that there is not a question later on.

23 THE COURT: I don't regard those as late
24 disclosed, even with the regard to the evaluation, trying to
25 figure out a reason why the computer may or may not have

1 turned itself on. I think I will allow that use.

2 I will allow the use of the searches for
3 those -- the information that was derived and testified to at
4 the prior hearings, because I don't think that is late
5 disclosed either. And I will take the State at its word that
6 Mr. Butner is not seeking to use the other 60,000 or better
7 pages of information with regard to that.

8 But I think both sides have been aware,
9 and to the extent that there can be some explanation by
10 better trained experts than Detective Page with regard to
11 tracing those particular items to try to make a determination
12 about when they were created or took place, I think is
13 relevant information, it is probative information, and not
14 unfairly prejudicial, given that it was known to the defense
15 previously.

16 I think the additional information to
17 dump -- we are not talking about a 34-day trial, we're
18 probably talking about a year or two trial, if they were
19 trying to get in 70,000 pages' worth of documents. And so I
20 guess part of my problem with the whole issue of the numbers
21 of pages dumped is what the defense is talking about with
22 regard to lacking enough time to do it when the information,
23 it seems to me, was available to the State's representatives
24 and capable of disclosing if it had any relevancy much
25 earlier. And the failure to segregate the relevant

1 information from the clearly irrelevant information just to
2 dump it, I don't think is a fair way of approaching -- or
3 what the rules of procedure for criminal cases intends.

4 So, analyzing it in terms of sanctions, I
5 think a preclusion order is appropriate for those items that
6 do not pertain to what was previously presented by the State,
7 but I don't find a vast volume of that probative based on
8 what Mr. Butner has told me. I find probative those items
9 that pertain to alleged searches for information as
10 previously disclosed and testified to in the prior hearings.

11 So I guess I recognize what you are
12 saying. I would ask the State to clarify with more precision
13 which precise Bates numbers they intend to use actually from
14 those general topic areas of searching for Web sites
15 containing that information. I think some of the testimony
16 and maybe some of the exhibits that we have seen earlier
17 presented to the Court may show identity of those documents,
18 but I share the defense's concern of a need for greater
19 precision about -- well, searches for what words, to what
20 extent those can be identified and the documentation that has
21 been presented out of the vast numbers of documents that are
22 potential for use.

23 MS. CHAPMAN: Your Honor, could we ask that
24 that be done by a certain date just so that we can process
25 that on our end, as well?

1 THE COURT: Do you have a proposal?

2 MR. BUTNER: Yes, Judge. We will have that
3 done by the time we submit our exhibits for marking.

4 THE COURT: Okay.

5 MS. CHAPMAN: Which is Monday.

6 THE COURT: And that is Monday. Okay. Thank
7 you. I appreciate the speed that you are committing to. And
8 so ordered by Monday, April the 19th.

9 MS. CHAPMAN: Thank you. Your Honor, I know
10 that your April 8th order addressed some of the La Sportiva
11 information, so I would like to narrow it down for one
12 particular issue, and that really is this ~~issue of the sample~~
13 shoe and photographs of the sample shoe.

14 This La Sportiva shoe is no longer in
15 production, so no person can go out and buy it or order it or
16 find it. The State apparently did have a sample shoe
17 provided to it. I am not really sure how that happened. No
18 sample shoe has been provided to the defense. The State,
19 then, apparently provided that sample shoe to Commander
20 Mascher. Also, apparently, provided that sample shoe to a
21 Stutchman Forensics, and that's the subject of a motion that
22 was filed this morning, Your Honor, but also provided it to
23 Mr. Gilkerson. And apparently, these photos of the sample
24 shoes were also provided to those same experts. They were
25 superimposed on some other photos of shoeprints that was the

1 subject of the motion that was filed today.

2 THE COURT: Photos or Xerox copies of the --

3 MS. CHAPMAN: I think these are photos of
4 some -- we guess they are sample shoes. I don't have any
5 reports, so I don't know who took the photos or where they
6 come from or anything really about the sample shoe, other
7 than it appears to be a shoe that's no longer in production
8 that was provided to experts and to Commander Mascher, but
9 wasn't provided to us.

10 With three weeks to go, Your Honor, we're
11 not in a position -- even if it was provided to us, which it
12 hasn't been -- to examine or otherwise evaluate either the
13 sample shoe or the report that Mr. Gilkerson has now prepared
14 as a result of this sample shoe or these photographs. We
15 don't have the ability to go get the sample shoe. We don't
16 have the ability to perform independent analysis or
17 examination or comparisons that have been done with the
18 sample shoe. We haven't been provided with any 15.6 notice
19 that these sample shoes are going to be provided or that
20 there's going to be any other information with respect to the
21 sample shoe.

22 So what we are asking at this point, Your
23 Honor, is that any evidence, the photographs, or any reports
24 that relate to the sample shoes, any examination or
25 evaluation that have anything to do with these sample shoes

1 or these photographs be precluded, based on the fact that we
2 don't have them, we don't have time, if they were provided to
3 us now, to do the examination or evaluation on them, they
4 haven't been provided to us, and we have no way to get them.

5 THE COURT: Mr. Butner, tell me about the
6 shoes.

7 MR. BUTNER: Well, Judge, Detective McDormett
8 got the sample shoe from La Sportiva.

9 THE COURT: When?

10 MR. BUTNER: Not very long ago, and I can't
11 tell you exactly when that is, Judge, but not ~~very long~~ ago.

12 THE COURT: Did he do a report that reflects
13 that?

14 MR. BUTNER: I believe so, but I can't give
15 you the number of it at this point in time. Yes, it was
16 reflected in a report.

17 And that is where those shoes were
18 obtained from, and the defense has the same opportunity to
19 get sample shoes from La Sportiva that the State does.

20 THE COURT: Are you intending to introduce the
21 sample La Sportiva shoe?

22 MR. BUTNER: We were intending to introduce
23 the sample La Sportiva shoe, yes.

24 THE COURT: Don't they have a right to examine
25 the evidence that purportedly you will be using?

1 MR. BUTNER: Certainly they do. Certainly
2 they do, and they can examine it.

3 THE COURT: Don't they have a right to do
4 their own testing with --

5 MR. BUTNER: If they ask to do that, I think
6 they probably do. Sure, they can do some testing on it.

7 I'm not sure that we have the shoe with
8 us right now. It may be with the FBI. I think it's there,
9 is at the FBI, but we could, of course, get it back from them
10 and plan on doing so.

11 THE COURT: When you say "FBI," does that mean
12 Quantico?

13 MR. BUTNER: Yes.

14 THE COURT: That is where you believe it is
15 now?

16 MR. BUTNER: Right.

17 THE COURT: Ms. Chapman.

18 MS. CHAPMAN: Your Honor, it is not just the
19 introduction of these shoes and these photographs, but these
20 shoes and these photographs -- and I guess part of it's been
21 addressed by Your Honor's order this morning with respect to
22 Commander Mascher, but Mr. Gilkerson's report relies on these
23 sample shoes. He has already been sent these sample shoes
24 and apparently examined them.

25 And these photographs that were recently

1 disclosed -- late disclosed, purport to have some kind of
2 comparison between photographs of shoeprints and apparently
3 some kind of imposition of a sample shoe sole that appeared
4 to be maybe from these photos that we got that may be these
5 sample shoes, although we don't know because we don't have
6 disclosure about them, and we don't have them.

7 So it would be more than just the sample
8 shoes themselves. It would be the reports and examinations
9 and comparisons based on those reports of those shoes. And
10 we raised this issue early on, that we didn't have the sample
11 shoes nor any capacity to get them.

12 THE COURT: Are you making a representation
13 that you attempted with La Sportiva and were unsuccessful?

14 MS. CHAPMAN: We did not attempt with La
15 Sportiva because the report that we have indicates that they
16 are no longer in production. The report that we have from La
17 Sportiva is that La Sportiva doesn't create these shoes, and
18 they're not for sale or production.

19 THE COURT: The soles, as I understand it,
20 were not exclusive to La Sportiva.

21 MS. CHAPMAN: The soles, as I understand it,
22 were made in China.

23 THE COURT: By a different company than the
24 company that produces La Sportiva?

25 MS. CHAPMAN: Right.

1 MR. BUTNER: Judge, they are exclusive to La
2 Sportiva, those soles, but they are made for the La Sportiva
3 company in China. And we got those sample shoes, so to
4 speak, from La Sportiva after they were out of production,
5 also. They still may have a few of them around. That's how
6 we got it, because they had a few of them around.

7 We have provided the defense with the
8 photographs that Eric Gilkerson relied upon, and we have
9 provided the defense with copies of the photographs of the
10 soles of the shoe, we provided them with disclosure on all of
11 that stuff, Judge.

12 THE COURT: This still harkens back to the
13 other issues that I think we addressed earlier of where the
14 photographs were taken of the precise prints was something
15 that the photographer couldn't identify. Is that right?

16 MR. BUTNER: You know, I can't say that for
17 sure, because the photographs that Gilkerson relied upon were
18 the ones that were done in a measure box. And so it may be
19 that there can be testimony about those in terms of exactly
20 where that was accomplished. But I can't -- I'm not in a
21 position to explain that at this point in time, Your Honor.

22 THE COURT: All right. From a simple
23 discovery process perspective, I think that the fact that the
24 State intends to use the particular samples that they
25 obtained for demonstrative, if not other evidentiary

1 purposes, I think allows the defense to examine those, to do
2 their own testing with those, and I think the defense has an
3 opportunity to do that if the State intends to submit those
4 as evidence items.

5 The defense hasn't asked, apparently,
6 La Sportiva for a pair of sample shoes meeting the
7 description, but I think defense is entitled to have their
8 witnesses or experts take photographs, take Xerox copies of
9 the bottom of the shoes, to ask that those be released to the
10 defense under stipulations with regard to their return. And
11 they haven't done that, to my knowledge, or at least not that
12 has been presented. I am open to being educated with regard
13 to those issues. But from a simple timing of the disclosure,
14 as I said the other day, I am not prepared to preclude the
15 evidence, and I did impose sanctions for the late disclosure
16 of that that includes striking aggravating factors.

17 Ms. Chapman.

18 MS. CHAPMAN: Your Honor, if I might. To be
19 clear, I am not -- and we are not requesting that you
20 sanction by exclusion all of the shoeprint evidence.

21 What we are asking you to preclude is the
22 evidence that relates to the examination and comparison of
23 the sample shoe, because we are three weeks away. Even if
24 the State provided us with the shoe today -- and we think we
25 need the shoe, not just photographs of it -- the shoe that

1 was sent to the FBI was provided -- the shoe itself, to
2 Commander Mascher. I think there was more than one shoe that
3 the State received. The photographs show pictures of
4 multiple shoes, so we would need to actually have the shoe.

5 But even if we received it today, with
6 three weeks to go, we simply don't have time to do what is
7 necessary to be done. I'll note that apparently
8 Mr. Gilkerson had the shoe for a lot longer than three weeks
9 to perform the examination that he did.

10 And we are asking, Your Honor, to
11 preclude only those reports and examinations that rely or
12 relate in any way to the sample shoe -- to the photographs of
13 the sample shoe and to the actual examination of the
14 comparison of the sample shoe -- not to the earlier report.
15 I understand your sanction with respect to that, but this is
16 another late disclosure. We're three weeks away. We don't
17 have time to even make use of it if it was provided. That's
18 what we're asking.

19 THE COURT: I am not convinced of the latter
20 part of your argument, that you don't have time to be able to
21 have an evaluation if you get the shoes, so I am going to
22 deny the preclusion.

23 MR. BUTNER: Thank you, Judge.

24 THE COURT: Jail visit recordings. Actually,
25 we are right at about noon, so you have about ten minutes for

1 me to be able to give my staff a lunch.

2 MS. CHAPMAN: Okay. Your Honor, with respect
3 to the jail visit recordings, Your Honor had entered an order
4 back in January for the State to identify what statements of
5 Mr. DeMocker's it relied on. For those statements before
6 December 31st, the date was February 6th; for those
7 statements through January, it was February 13.

8 THE COURT: Right.

9 MS. CHAPMAN: The State disclosed in January
10 summaries of over 1,000 jail calls to the defense. It didn't
11 identify any of them as statements it intended to rely on.
12 It did produce a police report entitled "Call Summaries," and
13 then other summaries were provided on CD.

14 The State later indicated that we were
15 supposed to somehow divine that those that were put in a
16 police report as opposed to a CD were those statements that
17 it intended to rely upon. Those summaries the State began to
18 generate in 2008. They didn't disclose any of them to us
19 until January of 2010. So they were all late disclosed.
20 None of them, again, were identified as statements.

21 And then in the State's reply it
22 indicates, well, we have filed additional supplements, which
23 we also didn't identify as statements, which we also expected
24 you, the defense, to divine were somehow statements we
25 intended to identify on. And both of those disclosures, Your

1 Honor, one which was made in March and one which was made in
2 April, contain statements from 2009 and January 2010, both of
3 which would be precluded, based on your earlier deadlines
4 requiring disclosure by February 6th and February 13th,
5 respectively.

6 So we'd ask Your Honor to limit the State
7 to statements that it properly disclosed under Rule 15, which
8 would be the statements that Mr. DeMocker made to
9 authorities, once we get through the voluntariness hearing.
10 But with respect to their requirements under Rule 15, the
11 only properly identified statements are the statements that
12 Mr. DeMocker made to law enforcement, and that's it.

13 They haven't identified any other
14 statements as though they intend to rely on. They certainly
15 didn't do it in a timely way. All of the summaries disclosed
16 in January were late disclosed because they were generated as
17 early as 2008. None of them were identified properly as
18 statements they intended to rely on. These later reports
19 were both late disclosed.

20 There are two calls on the April
21 disclosure that relate to February that may not be late
22 disclosed, based on their timing now, because I don't think
23 Your Honor imposed a deadline with respect to February or
24 later calls. We'd ask you to impose a deadline now for any
25 and all calls and any and all statements. These also were

1 not disclosed or identified as statements that the State
2 intends to rely on.

3 And the other thing, Your Honor, is that
4 in this disclosure that the State now says was a disclosure
5 of statements, even though it's just called call summaries,
6 the State also revealed that it's disclosing a visitation
7 summary, that it's listening somehow to Mr. DeMocker's
8 visitation rooms from February, and no recording of that
9 visitation has been provided. We have been provided with
10 three visitation recordings all from January, none from
11 February.

12 The other thing the State did, Your
13 Honor, in terms of statements, and it responds like this in
14 this most recent response, is it provides a list of 16, I
15 think, people and it says that it intends to rely on any and
16 all statements that Mr. DeMocker made to a list of these 16
17 people. It does not provide what those statements are, any
18 date of statements, when those statements were made.

19 Your Honor, we provided this as an
20 attachment to an earlier filed motion, but I have a copy of
21 it for you. It literally just says "any and all statements
22 defendant made," and then it lists a list of people. That is
23 also not compliant with Rule 15. The State hasn't identified
24 properly any statements other than those Mr. DeMocker made to
25 law enforcement on July 2nd and 3rd and October 23rd.

1 So we'd ask Your Honor to limit their use
2 of any and all statements to those statements that it's
3 properly identified.

4 THE COURT: Mr. Butner.

5 MR. BUTNER: Judge, first of all, the State
6 has made all kinds of disclosure about all of the statements
7 that Mr. DeMocker has made, starting with, of course, the
8 interviews that took place in close proximity to the crime,
9 and then thereafter there were other statements that were
10 discovered that were disclosed to the defense, and they have
11 been noticed in terms of the statements made to all those
12 people that were identified. They are all set forth in the
13 reports.

14 THE COURT: In terms of identifying them, we
15 are not talking about the ones that were made to law
16 enforcement. They are conceding to that point.

17 Apparently, we are talking about jail
18 visits or statements that are attributed to Mr. DeMocker from
19 civilian witnesses, not law enforcement personnel.

20 MR. BUTNER: Well, those are very different
21 sorts of statements.

22 THE COURT: I understand that.

23 And so the -- with regard to the jail
24 visits, don't you think that Rule 15.1 requires you to
25 provide the recording of the statement?

1 MR. BUTNER: Yes.

2 THE COURT: And don't those have to be timely
3 disclosed?

4 MR. BUTNER: Well, we didn't realize that we
5 were going to need to provide those things until January, and
6 we gathered that stuff up and provided it, Judge. It had
7 been being accumulated, in terms of people listening to the
8 calls and making synopsises.

9 When we disclosed it, we were under the
10 order of the Court and of the belief that we needed to
11 disclose the ones that mattered, so to speak, and we
12 identified those with a specific report from Detective
13 McDormett.

14 THE COURT: How do the statements fit in to
15 having some probative value on the merits of the case? What
16 is the nature of the statements, since I don't have access
17 here?

18 MR. BUTNER: **There** is so many, Judge, **that** I
19 can't tell you right now, but let me clarify to you.

20 The actual recordings of the jail visits
21 were being disclosed in a timely fashion as we went along.
22 It was the synopsises and then the requested additional
23 specificity as to are these important ones that was clarified
24 by the report from Detective McDormett.

25 In terms of the other statements to other

1 people, that was made clear right at the outset in the police
2 reports. For example, statements to Charlotte DeMocker and
3 Jacob Janusek in close proximity to the time; statements that
4 Mr. DeMocker made to other people about where he was and what
5 he was doing, things of that nature; Rene Gerard -- how he
6 took Rene Gerard out to the scene and showed her around --
7 showed her where he rode his bike that day. That's a
8 statement made by the defendant that was specified in the
9 reports, that were disclosed very early on in this case.

10 THE COURT: And are in constituent recordings
11 from jail conversations?

12 MR. BUTNER: The only ones that are really
13 specified in terms of being relevant and probative -- I think
14 that's what you are asking --

15 THE COURT: Uh-huh.

16 MR. BUTNER: -- and material, would be the
17 ones that were specified in Detective McDormett's report that
18 came out, basically, shortly after contemporaneously with the
19 January 29 disclosure, is my recollection.

20 THE COURT: And have --

21 MR. BUTNER: And we have done another one
22 since then? Okay. We have done another one since then.

23 THE COURT: And in general, what do they
24 purport to prove? They aren't admissions of having committed
25 the offense, I take it.

1 MR. BUTNER: No, they aren't that. But they
2 are basically various statements along the lines of he was
3 experiencing financial pressure or in one instance I think he
4 has made a statement as to riding his bike in the area. That
5 kind of thing.

6 THE COURT: And don't we get to the point of
7 cumulative on this stuff?

8 MR. BUTNER: It may well be that we would get
9 to the point of cumulative on that stuff. That is exactly
10 right, Your Honor.

11 THE COURT: Okay. Why, if you concede the
12 point, were some disclosures made after the cutoff date that
13 I imposed?

14 MR. BUTNER: Well, first of all, because we
15 didn't think that they were of any significance until they
16 were reviewed more carefully, and then it was determined that
17 they were relevant to certain issues in the case, and that
18 they have been requested. And so we complied with the
19 Court's order.

20 Now, bear in mind, Judge, we had been
21 disclosing the actual recordings all along.

22 THE COURT: That was part of my question that
23 I think you answered earlier.

24 MR. BUTNER: Okay.

25 THE COURT: Ms. Chapman.

1 MS. CHAPMAN: Your Honor, this arose
2 originally back in November or December, because we had
3 received over, I think, 2700 jail calls at that time. We
4 continued to receive them, and it is a very large quantity.
5 And that is why at the time Your Honor ordered the State to
6 identify by call time and number and recording number which
7 statements it was going to rely on, so that it could be
8 narrowed down. Because the State originally said "We're
9 going to rely on all 2700 of these calls." And apparently,
10 what I understand the State --

11 THE COURT: And are you saying that they
12 didn't do that at all?

13 MS. CHAPMAN: I'm saying they did that with
14 respect to a certain number of calls. They didn't identify
15 them in any way. They didn't say these are the statements we
16 intent to rely on, as Your Honor had ordered.

17 They provided them in a police report,
18 and they provided them in a thousand summaries and said you
19 should be able to figure out that this is what we meant.
20 Well, now we understand what they meant, but that is not what
21 happened. They didn't do it in compliance with Your Honor's
22 order.

23 They later have now disclosed additional
24 reports that they said they intend to rely on that are past
25 the deadline. So frankly, I don't know exactly what they

1 intend to rely on from these call summaries. And in addition
2 to that, this disclosure that just lists any and all
3 statements defendant made to 16 people doesn't comply with
4 that order either.

5 We need to know what statements the State
6 intends to use from what dates so that we are prepared and so
7 we can address whether they are cumulative or whether they
8 are relevant. That is what Your Honor's order contemplated.
9 That's what the rule contemplates. That's what will permit
10 us to be prepared to try this case in three weeks, and that's
11 not where we are, based on the State's disclosure.

12 My understanding of these supplemental
13 reports in March and April -- we continue to get recordings,
14 but these reports are apparently -- although they weren't
15 identified that way when they were disclosed, they've now
16 been identified as statements that the State intends to rely
17 on. They do have statements that were made in November of
18 2009 and January of 2010. They are being disclosed to us
19 now.

20 And again, Your Honor, all of these
21 summaries were withheld from us from late -- from January of
22 2010. We did have the 2700 recordings with no transcripts or
23 summaries that the State was receiving.

24 So we believe we should have been -- and
25 under your order and under the rule -- provided with notice

1 of the statements before today. We weren't provided with
2 that notice before today. We don't presently have the
3 notice. We don't think they've complied with the rule, and
4 we think what they've properly identified are the statements
5 that Mr. DeMocker made to law enforcement on July 2nd and 3rd
6 and October 23rd, and other than that, they haven't complied.

7 THE COURT: Well, I am going to wrap by the
8 order that I entered previously. And other than recordings
9 that may have taken place after the date -- and I didn't set
10 any time limits with regard to those made subsequent to that,
11 I was concerned about what had already taken place.

12 I think that the State has not complied
13 with Rule 15.1 in specifically identifying which statements
14 were to be made, and that is what the Court's order was
15 contemplating, so that there could be some true knowledge
16 about what the State regards as probative, relevant
17 statements from particular dates and time frames. To the
18 extent that they've provided summaries that identify by date
19 or a portion of the CD with some specificity, I am going to
20 let them use the statements potentially as far as exclusion
21 is concerned. I still see some other issues with regard to
22 relevance, cumulative, and those sorts of things.

23 So the recordings, in terms of failure to
24 comply with the Court's order, I am going to sanction as I
25 said I would sanction and preclude those from being used.

1 But in terms of the identification of phone calls, where the
2 phone calls were provided and some information was provided
3 before the Court's deadlines with regard to which statements
4 were made, I will let the State potentially use those as
5 against a sanction being imposed for that.

6 Mr. Butner, I am not clear, and I guess
7 even though they know the case much better than I do in terms
8 of the actual statements, it seems to me that the defense is
9 not clear about -- still -- about what statements on what
10 relevant points Mr. DeMocker may have made in jail, phone
11 calls, and the offer of proof isn't -- to the extent that you
12 discussed that as part of your response, isn't very
13 clarifying to me.

14 So, if there -- with regard to those
15 statements that you believe you timely disclosed, I think
16 there still needs to be an identification of the statement
17 made, of the timing of it, of what you are going to use in a
18 redacted form. You know, we are less than a month from trial
19 commencing. I recognize that we may not be a month from when
20 the stuff may be used. That may be further on down the road.
21 I think the defense needs that and needs that also by Tuesday
22 of next week. So ordered.

23 Miss Chapman.

24 MS. CHAPMAN: Your Honor, the only thing I
25 would add or ask is that with respect to this list of the

1 statements to and from this list of names, can we also get
2 some kind of clarification about those statements and the
3 date with respect to those -- if they don't relate to jail
4 calls, if they do? I just have no way to know, based on -- I
5 can provide this to Your Honor, but I have no way to know
6 based on this, and I wouldn't want it to be a preservation of
7 any other statement.

8 MR. BUTNER: Those statements are not jail
9 phone call statements, Judge, and it was clear in the
10 disclosure that that is the case. Should I draw their
11 attention to the specific supplement in which the statements
12 appear?

13 MS. CHAPMAN: That would be great.

14 MR. BUTNER: I will do that.

15 THE COURT: That probably would be helpful.

16 MR. BUTNER: I'll do that.

17 THE COURT: I think you can probably do that
18 fairly easily. Can you get that by Tuesday, also?

19 MR. BUTNER: I can.

20 MS. CHAPMAN: And so, Your Honor, are you
21 going to provide deadlines, then, for the other calls? I
22 mean, if this is going to a problem that continues to trickle
23 in, are we going to --

24 THE COURT: I suppose. If there are
25 additional calls and the State intends to use any of that

1 information, I am going to say that they need to be disclosed
2 within three days of when the call is made. Any that precede
3 today's date, I'll order be disclosed by Tuesday.

4 If there are additional recordings going
5 on, though, which I imagine there are, they have to be
6 disclosed within three days of when they occur -- or as soon
7 as soon as the State learns of them, if we are already in
8 trial.

9 Satisfactory?

10 MS. CHAPMAN: Yes, Your Honor.

11 MR. BUTNER: Understood.

12 THE COURT: Both sides, it's clear?

13 MR. BUTNER: Understood.

14 THE COURT: We have Miss Smith coming at 1:15.

15 (Whereupon, these proceedings were concluded.)

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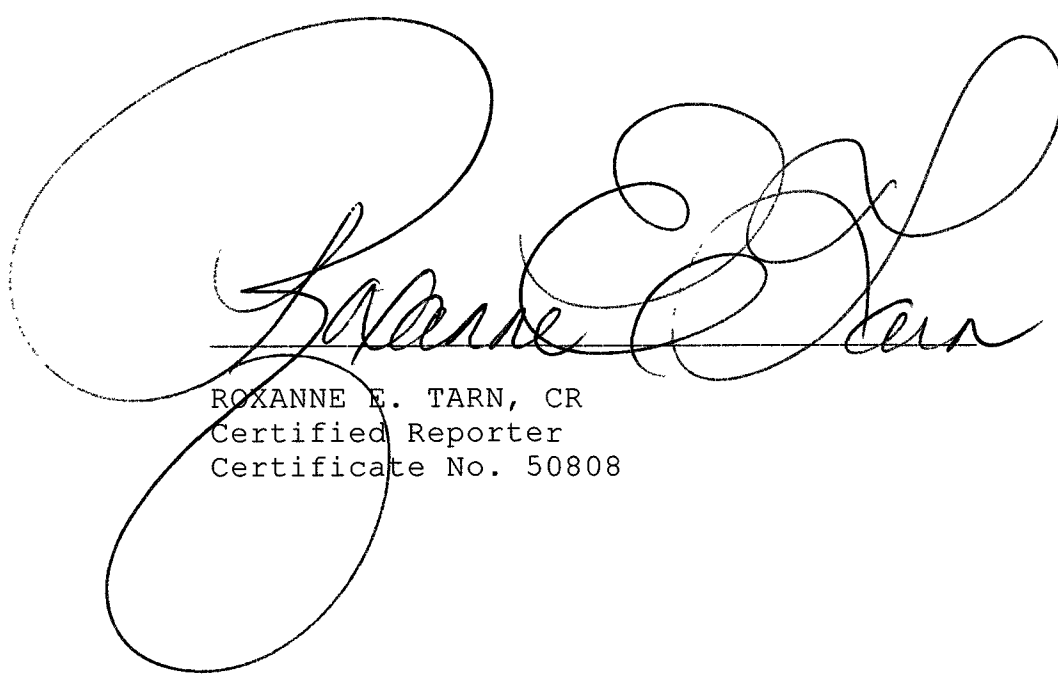
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C E R T I F I C A T E

I, ROXANNE E. TARN, CR, a Certified Reporter
in the State of Arizona, do hereby certify that the foregoing
pages 1 - 49 constitute a full, true, and accurate transcript
of the proceedings had in the foregoing matter, all done to
the best of my skill and ability.

SIGNED and dated this 15th day of April, 2010.



ROXANNE E. TARN, CR
Certified Reporter
Certificate No. 50808